In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1293

CITY OF BLACK JACK, MISSOURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-23 to A-37) is reported at 508 F.2d 1179. The opinion of the district court (Pet. App. A-2 to A-22) is reported at 372 F. Supp. 319.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1974. A timely petition for rehearing was denied on January 20, 1975 (Pet. App. A-38). The petition for a writ of certiorari was filed on April 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner's adoption of a zoning ordinance limiting new residential construction to single-family dwellings made unavailable or denied dwellings to persons because of race, in violation of Title VIII of the Civil Rights Act of 1968.

STATUTES INVOLVED

The pertinent provisions of Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.*, are set forth at Pet. 3.

STATEMENT

In 1969, the Inter Religious Center for Urban Affairs ("ICUA") secured an option to purchase 11.9 acres of land in an unincorporated area of St. Louis County, Missouri; the land had been designated by the county for multiple-family construction (Pet. App. A-25). ICUA intended to construct a development of inexpensive two-story townhouses, to be known as Park View Heights, that would provide an alternative rental housing opportunity for individuals and families residing in the ghetto areas of the City of St. Louis (*ibid.*). The proposed development received preliminary approval from the Secretary of Housing and Urban Development for federal financial assistance on June 5, 1970 (*ibid.*).

Local opposition to the proposed development "was swift and active" (*ibid.*):

> Upon learning of the "feasibility letter" [sent to ICUA by the Secretary], area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation with

1,425 signatures to the St. Louis County Council. * * * [T]he * * * Council incorporated the City of Black Jack, Missouri, on August 6, 1970.

* * * * *

Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance which would effectively prevent the construction of new multi-family dwelling units within the City of Black Jack. On October 20, 1970, the City Council passed the proposed zoning ordinance. [*Park View Heights Corporation* v. *City of Black Jack*, 467 F.2d 1208, 1211 (C.A. 8).]

The United States then instituted this action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, alleging that the purpose and the effect of enacting the zoning ordinance had been to make unavailable or to deny dwellings within petitioner's boundaries to low- and middle-income black residents of the St. Louis metropolitan area. The United States offered substantial evidence that a principal purpose of the incorporation and the enactment of the zoning ordinance was to restrict the Black Jack area almost exclusively to white residents. On the question of effect, the United States showed that the population in the Park View Heights development was expected to include a substantial percentage of blacks whereas the population of Black Jack was 99 percent white, and there-

fore that enactment of the ordinance contributed to the perpetuation of residential segregation on the basis of race (Pet. App. A-3, A-11 to A-13, A-21, A-32).[1]

The district court held that the evidence of racially discriminatory purpose was insufficient to "support a charge of racial motivation, purpose, or intent in the incorporation of Black Jack as a city or the passing of Black Jack's zoning ordinance" (Pet. App. A-19). The court also determined that the zoning ordinance was not racially discriminatory in effect, because it effectively bars low- and middle-income whites, as well as blacks, from living in Black Jack (Pet. App. A-20 to A-21).

The court of appeals reversed. In the view the court took of the case, it was not necessary to determine whether the district court's finding of no racially discriminatory purpose was clearly erroneous. However, the court of appeals clearly viewed that finding as erroneous (Pet. App. A-30 to A-31, n. 3):

> Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone. * * *

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[1] With respect to the expected population of the Park View Heights development, the court of appeals noted (Pet. App. A-33):

> Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development * * *.

But the court of appeals rested its decision upon a finding of racially discriminatory effect coupled with the fact that the ordinance failed to further any governmental interest. The court noted that the parties had stipulated that segregated housing in the St. Louis metropolitan area was "in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments" (Pet. App. A-33) and determined that "the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent White" (*ibid.*). The court concluded that the governmental interests advanced by petitioner—road and traffic control, prevention of overcrowding of schools, and prevention of devaluation of adjacent single-family homes—were in fact not threatened by the proposed Park View Heights development and therefore did not justify the perpetuation of housing segregation to which the zoning ordinance would contribute.

ARGUMENT

The judgment below is correct because there was clear and sufficient evidence of impermissible racial purpose and effect in both the incorporation and the zoning. It is clear from the record, as recited by the court of appeals (Pet. App. A-23 to A-27), that petitioner was incorporated, and its restrictive zoning ordinance enacted, in order to bar construction of a proposed racially integrated housing development that had been intended for the alleviation of the effects of prior racial discrimination in the local housing market. Moreover, "[t]he uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone" (Pet. App. A-31, n. 3).[2] The effect of the ordinance is to per-

[2]This statement by the court of appeals directly contradicts petitioner's bald assertion that the ordinance "was not motivated by, nor intended to effect, racial discrimination" (Pet. 9).

petuate a pattern of residential segregation that itself results from deliberate racial prejudice.[3] And the ordinance furthers no asserted governmental interests.[4] In these circumstances, petitioner's adoption of the zoning ordinance was unlawful under Title VIII of the Civil Rights Act of 1968.

1. Petitioner challenges the decision below as an impermissible infringement upon its municipal power to enact facially neutral zoning ordinances (Pet. 9-12). But the municipal zoning power does not extend to the enactment of racially segregatory ordinances. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 6. And an otherwise racially discriminatory enactment or practice cannot be sustained under Title VIII merely because it appears to be neutral on its face. *Williams* v. *Matthews Company*, 499 F.2d 819 (C.A. 8), certiorari denied November 18, 1974 (Nos. 74-63 and 74-296); *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.*, 436 F.2d 108 (C.A. 2), certiorari denied, 401 U.S. 1010. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *Gomillion* v. *Lightfoot*, 364 U.S. 339.

2. Petitioner further contends (Pet. 12-14) that the court of appeals imposed a strict compelling-governmental-interest standard of review in testing the validity of the zoning ordinance under Title VIII and that a more lenient

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[3]Although petitioner asserts that "there clearly was no showing in this case of * * * a prior pattern of discrimination" (Pet. 14), in fact the parties stipulated at trial to the existence of such discrimination (Pet. App. A-33 and n. 5).

[4]Petitioner had asserted three principal interests to justify its ban against construction of Park View Heights: road and traffic control, prevention of overcrowding of schools, and prevention of devaluation of adjacent single-family homes (Pet. App. A-33 to A-34). The court of appeals carefully reviewed the evidence and concluded "that there is no factual basis for the assertion that any one of the three primary interests asserted by [petitioner] is in fact furthered by the zoning ordinance" (Pet. App. A-34).

standard of review has been applied by this Court in analogous cases brought under the Equal Protection Clause of the Fourteenth Amendment.

Petitioner misdescribes the standard of review applied by the court of appeals. Although that court did at one point refer to the applicability of the compelling-governmental-interest test (Pet. App. A-31), that test was not in fact applied here because the court concluded that, far from serving a compelling governmental interest, petitioner's zoning ordinance furthered no substantial governmental interest whatsoever (Pet. App. A-34 to A-36). See note 4, *supra*. Thus petitioner's attack upon the compelling-governmental-interest standard of review is, in the context of this case, of merely academic interest.

In any event, that strict standard of review is the one commonly applied in testing the validity of discriminatory classifications or practices under Title VIII. See, *e.g.*, *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.*, *supra; United Farmworkers* v. *City of Delray Beach*, 493 F.2d 799 (C.A. 5). Application of that standard of review is an appropriate means of vindicating a policy—that of eradicating discrimination in housing on the basis of race—that Congress considered to be of the highest priority. Cf. *Lau* v. *Nichols*, 414 U.S. 563; *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205.

3. Finally, petitioner asserts (Pet. 15-17) that the decision below conflicts with *Ybarra* v. *City of Town of Los Altos Hills*, 503 F.2d 250 (C.A. 9), and *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (C.A. 6), certiorari denied, January 13, 1975 (No. 74-562). Those cases held that municipal exclusion of low-income housing did not, of itself, deny equal protection of the law in vio-

lation of the Fourteenth Amendment. Those cases, however, did not involve a racially discriminatory purpose for the exclusion and did not arise under the Civil Rights Act of 1968.

This case, unlike *Ybarra* and *Mahaley*, does not involve mere exclusion of low-income housing. The record reveals a concerted and single-minded effort upon the part of petitioner and its citizens to block the construction of a particular racially integrated housing development, in order to perpetuate a pattern of residential segregation on the basis of race. In these circumstances, the court of appeals' invalidation of petitioner's zoning ordinance was consistent with the decisions of other courts of appeals in similar cases. See, *e.g., Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y., supra*; *United Farmworkers* v. *City of Delray Beach, supra*; *Morales* v. *Haines*, 486 F.2d 880 (C.A. 7); *Dailey* v. *City of Lawton, Okla.*, 425 F.2d 1038 (C.A. 10); *Southern Alameda Spanish Speaking Organization* v. *City of Union City, Cal.*, 424 F.2d 291 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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